CHAPTER 1

CASE MANAGEMENT, REPRESENTATION OF GOVERNMENT DEFENDANTS, AND REMOVAL

1.1 General.

Suits routinely encountered by military attorneys may be brought initially in state court, in any of the 94 United States district courts,[1] or the United States Court of Federal Claims,[2] depending upon the relief sought and the expertise of the plaintiff's attorney.

Actions may be brought against named defendants, agencies, or the United States. Suits against government personnel in their individual capacities must be distinguished from suits against them in their official capacities because if actions beyond the scope of authority are at issue, government representation may not be extended and, if the action has been brought in a state court, it may not be removable.

The responsibilities of the Army lawyer include reporting litigation to the Litigation Division, Office of The Judge Advocate General (Army Litigation) and the Department of Justice (DOJ), assisting in the decision whether to represent named federal defendants, assisting in removal of the case to federal court if it was filed in state court, and assisting in the continuing defense of the case once these

[1] 5 U.S.C. §§ 81-131.

[2] Id.

preliminary matters are disposed of. The remainder of Chapter 1 is devoted to these preliminary steps.

1.2 Coordination with the Department of the Army and the Department of Justice.

Army Regulation 27-40, entitled "Legal Services: Litigation," sets out the basic responsibilities of lawyers in the field and Army personnel generally with respect to litigation.

Staff judge advocates are expected to establish and maintain liaison with the United States attorney in each district in their area.[3] Apart from the staff judge advocate and his personnel, only representatives of the Chief of Engineers and elements of the Office of The Judge Advocate General (including Army Litigation, Contract Law Division, United States Army Claims Service, Regulatory Law Office, Intellectual Property Law Division, Labor and Employment Law Office, Contract Appeals Division, Environmental Law Division, Criminal Law Division, and Procurement Fraud Division) are authorized to represent the Army or contact the Department of Justice.[4] More specifically, Army personnel may not "confer or correspond with any representative of DOJ concerning legal proceedings" except as provided in AR 27-40.[5]

Liaison with the United States attorney ensures that the United States attorney will notify the local installation of suits filed against the Army or its

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[3]Dep't of Army, Reg. 27-40, Legal Services: Litigation, para. 1-5b (19 Sep. 1994) [hereinafter AR 27-40].

[4]Id., para. 1-4.

[5]Id., para. 1-5a.

personnel.[6] This allows the local judge advocate or legal adviser and Army Litigation to enter the suit early and influence the course of the litigation. The local judge advocate or legal adviser must promptly contact the United States attorney when he becomes aware of a suit which has been filed. The United States attorney need not be notified in cases involving taxation, utility rate proceedings, or actions solely against contractors. When local judge advocates inform the United States attorney of a case, they should provide any process or pleadings and other assistance as requested, unless instructed to the contrary by The Judge Advocate General.

Generally, process and pleadings served on any Army personnel, command, or agency, including nonappropriated fund instrumentalities, are promptly referred to the servicing legal officer, or to the legal officer of the next higher organization where there is no servicing legal officer.[7] Military members and employees who are sued for damages arising from the performance of their official duties have the personal responsibility of informing their superior or commander of the suit and delivering process and pleadings to him. The commander or supervisor must then notify the legal officer.[8]

In suits involving possible congressional or Department of the Army (DA) interest or that require the attention of Army Litigation, the staff judge advocate or legal adviser must immediately notify HQDA, Army Litigation, the United States attorney, and/or the DOJ.[9] Examples of cases requiring the immediate attention of Army Litigation include lawsuits against an employee in his individual capacity,

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[6] Id., para. 1-5b.

[7] Id., para. 3-2b.

[8] Id., paras 3-2, 4-4. See 10 U.S.C. ? 1089(b) (1982); 28 U.S.C. § 2679(c) (1982); 28 C.F.R. § 15.1(a) (1987).

[9] AR 27-40, chap. 3.

habeas corpus petitions, motions for temporary injunctive relief, or any other case in which the return date is less than 60 days. The regulation explains what is required to be in this advisory report.

In most cases, whether or not an advisory report has been made, all process, pleadings, and allied papers are promptly faxed or mailed to Army Litigation with copies to superior headquarters.[10]

When an SJA or legal adviser learns of a criminal charge or a lawsuit alleging individual liability against DA personnel resulting from performance of official duties, AR 27-40 requires, among other things, direct coordination with Army Litigation and the appropriate United States attorney. The SJA must fax or express deliver copies of all process and pleadings.[11] Army Litigation will determine the DA position with regard to scope of employment and coordinate that position with DOJ.[12] If the defendant was acting within the scope of employment, the United States will usually be substituted as the defendant pursuant to 28 U.S.C. § 2679. United States attorneys are authorized to make the certification of scope of employment under this statute to effect the substitution.[13]

After advising Army Litigation of the pending litigation, the responsible staff judge advocate or legal adviser will prepare an investigative report (or litigation

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[10] Id., para. 3-3a.

[11] Id., para. 4-4a.

[12] Id., para. 4-4b.

[13] 28 C.F.R. § 15.3(a) (1993).

report) when directed by HQDA.[14] A copy of the investigative report is sent to Army Litigation and the United States Attorney Office handling the case.[15]

While any suit remains pending, Army lawyers in the field must monitor the litigation and advise Army Litigation of all significant developments.[16]

1.3 Responsibility for Conducting Litigation.

By statute, "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."[17] The Attorney General's "plenary power and supervision over all government litigation" precludes any agency from taking direct part in litigation except where expressly authorized by statute or the DOJ.[18]

Consequently, the agency and its attorneys are subordinated to the DOJ. But at the same time, the DOJ has some obligation to its agency clients. In S&E Contractors v. United States,[19] for example, the DOJ took the position that it could appeal a final agency decision in a contract claim. Implicit in the position was that agency decisions are not binding on the DOJ. The Supreme Court observed, however, that "where the responsibility for rendering a decision is vested in a

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[14] AR 27-40, para. 3-9.

[15] Id., para. 3-9g.

[16] Id., chap. 3.

[17] 28 U.S.C. § 516 (1982). See id. § 519 (1982).

[18] I.C.C. v. Southern Railway Co., 543 F.2d 534 (5th Cir. 1976), reh'g denied, 551 F.2d 95 (5th Cir. 1977). See AR 27-40, paras. 1-4a, 3-1a.

[19] 406 U.S. 1 (1972).

coordinate branch of government, the duty of the Department of Justice is to implement their decision and not to repudiate it."[20]

Most litigation involving the Army is handled by the local United States attorney. United States attorneys are appointed for four-year terms by the President for each judicial district.[21] Assistant United States attorneys are appointed by the Attorney General.[22] "Except as provided by law, each U.S. attorney" and his assistant United States attorneys prosecute "all offenses against the United States" and "prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned."[23]

Although the local United States attorney conducts most Army litigation, the DOJ in Washington, D.C., may conduct the litigation itself depending on the nature of the case. These selected cases are handled by the Civil Division based on the Attorney General's general supervisory power under 28 U.S.C. § 519, which provides that

> the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys . . . in the discharge of their respective duties.

This provision and 28 U.S.C. §§ 517 and 518(b), which allow any officer of the DOJ to appear in any court, enables trial attorneys in Washington, D.C., to supersede the local United States attorney.

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[20]406 U.S. at 13.

[21]28 U.S.C. § 541 (1982).

[22]Id. § 542 (1982).

[23]Id. § 547 (1982).

Under Federal Rules of Civil Procedure 4(d)(4), the summons and complaint initiating litigation against the United States is either mailed or delivered to the United States attorney and mailed to the Attorney General, and, where the order of an officer or agency is involved, to the officer or agency concerned. The Attorney General and United States attorney must also be served where suit is directly against an officer or agency.[24] This gives the DOJ an opportunity to review the complaint and to determine whether it should reserve authority. Routinely, a letter is sent to the agency (usually, in Army cases, to Army Litigation which takes action on all such letters) indicating whether the case will be handled from Washington, D.C., or locally by the United States attorney.

Army Litigation is the office authorized to represent the Army's position in all civil litigation.[25] The extent of such representation is subject to the statutory authority of the Attorney General.[26] Apart from providing support to those involved in the actual conduct of litigation, local Army lawyers are not authorized to conduct litigation on behalf of the Army without specific approval of TJAG after appropriate coordination with DOJ.[27] The sole exception to this is the authority for commanders to designate officers to prosecute minor offenses before magistrates (now misdemeanors).[28] Officers acting in this capacity will be appointed as Special

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[24]Fed. R. Civ. P. 4(d)(5).

[25]AR 27-40, para. 1-4d.

[26]On the general subject of the relationship between the DOJ and agency attorneys in government litigation, see G. Bell, The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?, 46 Fordham L. Rev. 1049 (1978).

[27]AR 27-40, para. 1-4f.

[28]Id., para. 1-4e(1). See Magistrates Act of 1979, Pub. L. No. 96-82, § 7(c), 93 Stat. 646 (1979).

Assistant United States Attorneys (SAUSAs) under 28 U.S.C. § 543;[29] they prosecute felony and misdemeanor cases committed on the installation--in which the Army has an interest--in federal court. These attorneys work under the supervision of the local United States attorney and only represent the United States in civil litigation if authorized by Army Litigation.

1.4 **Representation of Individual Defendants.**

Soldiers and employees are often sued in their individual capacities by plaintiffs seeking relief directly from them. Whether a person is being sued individually or only in his official capacity is sometimes unclear and is determined only from a close reading of the complaint. Judge advocates must focus on the nature of the relief sought in the complaint and the characterization of the defendant's alleged acts.

When a person is sued individually, one of the major concerns is whether the government will provide legal representation. It is DOJ policy to represent military personnel and employees who are sued or criminally charged "as a result of the performance of their official duties."[30] In cases where "time for response is limited," the local Army lawyer will request the United States attorney to temporarily represent the defendant and will promptly advise Army Litigation.[31] Army Regulation 27-40 provides clear guidance on requesting DOJ legal representation in civil and criminal actions alleging individual liability (medical malpractice lawsuits, suits resulting from motor vehicle accidents, constitutional torts, common law torts,

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[29] See Department of Defense Authorization Act for Fiscal Year 1984, Pub. L. No. 98-84, 97 Stat. 655 (1983). See DAJA-AL 1979/3958; DAJA-AL 1980/3252.

[30] AR 27-40, paras. 4-1, 4-2.

[31] Id., para. 4-4a(1).

environmental crimes and motor vehicle accidents resulting in criminal charges).[32] In general, the SJA or legal adviser must prepare a report for Army Litigation that details the facts of the incident and an opinion on whether the named employee was acting within the scope of employment at the time of the alleged incident.[33]

Although it is easy to satisfy the requirements of AR 27-40 regarding representation, lawyers advising individual defendants should fully understand how and why the representation decision is made by the DOJ so that they can adequately advise personnel who are sued. The DOJ will represent personnel sued in their official capacities without a formal request.[34] Representation of defendants sued individually is another matter.[35]

The authority to represent persons in their individual capacities flows from a liberal reading of 28 U.S.C. § 517, which provides that

> [t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district . . . to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States (emphasis added).

Authority to represent government employees has also been inferred from 28 U.S.C. § 513, which allows the service secretaries to seek advice on "a question of law" from the Attorney General, and from 28 U.S.C. § 514, which allows agency

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[32] Id., chap. 4. See 28 C.F.R. § 15.1 (1993).

[33] AR 27-40, para. 4-4a(5).

[34] See 4 U.S. Atty. Man. § 4-13.000.

[35] See generally Euler, Personal Liability of Military Personnel for Actions Taken in the Course of Duty, 113 Mil. L. Rev. 137, 158-60 (1986).

heads to request the service of counsel from the Attorney General to resolve any claim pending in the agency. The decision to extend representation is within the complete discretion of the DOJ. In Green v. James,[36] a civilian plaintiff, suing a military officer individually for allegedly tortious conduct, challenged the decision to provide the officer with government representation. The court held as follows:

> Representation by the Attorney General or the United States Attorney in this matter appears to be most proper. Sections 513, 514, 517 of Title 28, U.S. Code appear sufficiently broad to authorize such representation, and it further appears to be very clear that initial determinations at least as regards the existence of governmental interest, will be made unilaterally within governmental channels.[37]

Department of Justice regulations provide that both current and former government personnel may request representation for state criminal proceedings and in civil and congressional proceedings in which they may be sued or subpoenaed.[38] Historically, representation of a current or former federal employee in connection with a federal criminal matter has been expressly precluded by regulation.[39] Recently, however, the DOJ has acknowledged that while representation in federal criminal matters is generally inappropriate, "important non-prosecutorial Executive Branch interests may be implicated in federal criminal proceedings."[40] Accordingly,

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[36]333 F. Supp. 1226 (D. Hawaii 1971), rev'd on other grounds, 473 F.2d 660 (9th Cir. 1973).

[37]333 F. Supp. at 1228. See Moore v. Califano, 471 F. Supp. 146 (S.D. W. Va. 1979), appeal dismissed, 622 F.2d 585 (5th Cir. 1980) (U.S. attorney has authority to represent employees despite lack of express authority in 28 U.S.C. § 547); Government of Virgin Islands v. May, 384 F. Supp. 1035 (D.V.I. 1974) (authority to offer representation in criminal cases).

[38]28 C.F.R. § 50.15(a) (1990).

[39]E.g., 28 C.F.R. § 50.15(b)(1) (1989).

[40]See 55 Fed. Reg. 13,129-13,130 (1990).

the DOJ amended the representation regulations to permit, under certain circumstances, limited representation in connection with federal criminal proceedings.[41] Under the amended regulations, a current or former federal employee may be provided representation by an attorney from the DOJ if it is determined that representation is in the interest of the United States and the employee has not become the subject of a federal criminal investigation.[42] If the employee has become the subject of an investigation, but no decision has been made to seek a federal indictment or information against the employee, the employee may be provided representation by private counsel at government expense if the Attorney General or his designee determines that such representation is in the interest of the United States.[43] The DOJ will neither provide representation nor authorize representation by private counsel at government expense once a federal indictment is sought or an information is filed against the employee or former employee.[44]

Representation is conditioned on submission of a request for representation by the defendant and a recommendation by the agency to the DOJ as to whether it should grant representation. Accompanying the request and recommendation is a statement from the agency indicating whether the defendant was acting within the scope of his employment at the time he allegedly committed the actionable acts or omissions at issue.[45] However, according to 28 C.F.R. § 50.15(b)

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[41] See id. at 13,129 (1990) (codified at 28 C.F.R. §§ 50.15; 50.16).

[42] 28 C.F.R. §§ 50.15(a)(4); (7) (1990).

[43] See id. §§ 50.15(a)(7); 50.16(a); (d)(4) (1990).

[44] See id.

[45] Id. § 50.15(a)(1) (1990). A federal employee must also deliver all process served on him or her within the time limits established by the DOJ. Failure to do so may preclude the federal official from asserting an entitlement to immunity. See Tassin v. Neneman, 766 F. Supp. 974 (D. Kan. 1991).

> [r]epresentation is not available to a federal employee whenever:
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> (1) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;
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> (2) It is otherwise determined by the department that it is not in the interest of the United States to provide representation to the employee.

What the "interests" of the United States are is unclear. In one instance representation was denied where only some of the acts complained of were within the scope of employment.[46] A second instance where representation was found not to be in the interests of the United States is when the employee failed to promptly request representation and the case has progressed to a point where the DOJ's ability to defend has been prejudiced. It is the DOJ's position that a decision to deny representation is not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.[47] Congress changed this rule in 1988, but only with respect to cases involving state law torts. If an individual government employee is sued for a state law tort and the Attorney General refuses to certify that the employee was within the scope of employment, the employee can petition the court for a finding that he was acting within the scope of employment.[48]

Instances/situations exist in which the DOJ may elect to provide representation by private counsel at federal expense. Examples include when a person is under criminal investigation, but no decision as to indictment or

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[46] 57 Comp. Gen. 444 (1978).

[47] See Falkowski v. EEOC, 719 F.2d 470, 481-83 (D.C. Cir. 1983), vacated, 471 U.S. 1001 (1985) (decision that representation decisions reviewable summarily vacated).

[48] 28 U.S.C. § 2679(d)(3) (1995).

information has been made; when a conflict exists between the "legal or factual positions" of several employees being sued; where a conflict exists between the interests of the United States and the defendant; or where professional ethics would otherwise require.[49] Providing private counsel at federal expense is conditioned on a decision that the alleged acts or omissions were within the scope of office or employment.

Even if represented, the individual defendant remains liable for any money judgment.[50] As a matter of policy, the United States will pay tort judgments and settlements entered jointly against the government and individual federal defendants.[51]

Courts recognize the commitment of the government to represent government personnel.[52]

1.5 **Removal of Cases.**

Some cases against Army personnel for acts or omissions within the scope of office or employment are initially brought in state court. These cases require fast and attentive care as they usually involve short return dates and delays in responding may weaken the defense posture of the case. In these cases, the first step after resolving the representation question is removal to federal court.

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[49]28 C.F.R. § 50.16(a) (1993); see AR 27-40, para. 4-5.

[50]28 C.F.R. § 50.15(a)(8)(iii) (1993).

[51]Department of Justice, Torts Branch Monograph, Damage Suits Against Federal Officials 13 (1981).

[52]E.g., Stafford v. Briggs, 444 U.S. 527, 552 (1980). See Berman, Integrating Governmental and Official Tort Liability, 77 Colum. L. Rev. 1175, 1190-1193 (1978) (brief discussion of the representation issue).

The authority and procedures for removal of cases from state court to federal court are found in 28 U.S.C. §§ 1441-1451.[53] The general removal statute, 28 U.S.C. § 1441, allows removal at the instance of all defendants sued where the district court into which the case is removed would have had original jurisdiction.[54] Courts construe this general removal statute strictly and against removal.[55]

The general removal statute is the only method of removal for nonfederal defendants. Government personnel, in their official or individual capacities, may remove under 28 U.S.C. § 1442 as follows:

> (a) A civil action or criminal prosecution . . . against any of the following persons may be removed by them to the district court of the United States for the district . . . wherein it is pending:
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> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any

[53]In addition to these more generalized removal statutes, several specialized statutes exist that contain their own removal provisions. For the government attorney, perhaps the most important specialized removal statute is 28 U.S.C. § 2679(d)(2), as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988. Under 28 U.S.C. § 2679(d)(2), as amended, common law tort suits against federal employees may be removed from state court without bond on certification by the Attorney General or his designee that the employee was acting within the scope of employment in connection with the activities giving rise to the lawsuit. See 10 U.S.C. § 1054(c) (removal of certain suits against DOD attorneys); 10 U.S.C. § 1089(c) (removal of certain suits against DOD physicians).

[54]28 U.S.C. § 1441(b) (1995).

[55]Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951). But see Mignogna v. Sair Aviation, Inc., 679 F. Supp. 184 (N.D.N.Y. 1988) (a third-party defendant with a separate and independent daim that could have been filed in federal court initially can remove the case although the removal statutes have no provision for removal by third-party defendants).

Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

The military is primarily concerned with § 1442(a)(1), which deals with federal officers and persons acting under them.[56] Note that under § 1442(a), either civil or criminal cases can be removed and that removal is to the federal court in the district of the state in which the case is pending. The only exception to this "venue" rule is essentially where the federal defendant is: (1) sued by a non-citizen; (2) in a state in which the defendant is not located and of which he is not a citizen; and (3) personal jurisdiction is obtained under a long-arm statute. In these circumstances, § 1442(b) allows removal to the district where service was made rather than where suit was brought.

[56]As the Supreme Court recently explained, section 1442(a)(1) applies only to individuals, i.e., officers of the United States or officers of agencies of the United States, not to agencies themselves. See International Primate Protection League v. Administrators of Tulane Educ. Fund, 111 S. Ct. 1700 (1991) (National Institutes of Health lacked authority under 28 U.S.C. § 1442(a)(1) to remove to federal court a lawsuit against it by animal rights group alleging inhumane treatment of monkeys used in research).

Removal is usually from a state "court." Matters before some state administrative agencies, however, may also be subject to removal.[57] Exposure of military officers to state administrative orders, particularly in environmental law cases, which may ignore official immunity, make removal a course of action to consider pursuing.[58]

The history of § 1442 was explained by Justice Marshall in Willingham v. Morgan:[59]

> The first such removal provision was included in an 1815 customs statute. . . . It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done "under colour" of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts. This provision was not, however, permanent; it was by its terms to expire at the end of the war. But other periods of national stress spawned similar enactments. South Carolina's threats of nullification in 1833 led to the passage of the so-called Force Bill, which allowed removal of all suits or prosecutions for acts done under the customs laws. . . . A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws. . . . Finally, Congress extended the statute to cover all federal officers when it passed the current

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[57] See Floeter v. C.W. Transport, Inc., 597 F.2d 1100 (7th Cir. 1979); Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd., 454 F.2d 38 (1st Cir. 1972); Annot., 48 A.L.R. Fed. 733 (1980).

[58] See United States v. Pennsylvania Envtl. Hearing Bd., 584 F.2d 1273, 1276 (3d Cir. 1978) (commander of Scranton Army Depot held liable in state water pollution enforcement proceeding).

[59] 395 U.S. 402, 405 (1969).

provision as part of the Judicial Code of 1948. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947).

The purpose of all these enactments is not hard to discern. As this Court said nearly 90 years ago in Tennessee v. Davis, 100 U.S. 257, 263 (1880), the Federal Government

> "can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,--if their protection must be left to the action of the State court,--the operations of the general government may at any time be arrested at the will of one of its members.'[60]

In addition to § 1442, other statutes provide for removal in specific circumstances.[61]

An additional right of removal is provided for military personnel generally under § 1442a:

> A civil or criminal prosecution . . . against a member of the armed forces . . . on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law . . . which shall proceed as if the cause had been originally commenced therein. . . .

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[60] 395 U.S. at 405.

[61] See note 53, supra.

Originally Article of War 117, § 1442a was made a separate statute by the Act of May 5, 1950,[62] which established the Uniform Code of Military Justice (UCMJ). Although § 1442 also covers military personnel and did in 1950, § 1442a survives as an independent ground for removal. Originally, the reason for having a separate statute for removal in military cases was that § 1442 was limited to removal in revenue cases. Consequently, absent Article of War 117, there was no authority for the removal of cases involving military defendants. When the scope of § 1442 was extended to all federal officers, including the military, there was no further need for the separate military statute. Nevertheless, § 1442a remains available as alternative for removal.

The only advantage of § 1442a is that removal of either a civil or criminal case can occur anytime before trial or final hearing. Removals under § 1442a, on the other hand, are subject to the time limits in § 1446. Section 1446(b) requires the removal process in a civil case to begin within 30 days of service upon or receipt by the defendant of the initial pleading or summons, whichever is earlier. Where there are multiple defendants, the 30 days arguably begin to run when the first defendant is served.[63] Section 1446(c)(1) requires removal in a criminal case to generally begin within 30 days of the state arraignment or anytime before trial, whichever is earlier.

One advantage to § 1442 is that it allows a nonfederal officer acting under the direction of a federal officer to remove his case to federal court whereas this feature is absent from § 1442a. Apart from these differences, there is no relevant distinction between § 1442(a)(1) and § 1442a.[64]

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[62]Pub. L. No. 81-506, 64 Stat. 107 (1950).

[63]Balestrieri v. Bell Asbestos Mines, Ltd., 544 F. Supp. 528 (E.D. Pa. 1982).

[64]Mir v. Fosburg, 646 F.2d 342, 344 (9th Cir. 1980).

As compared with the general removal statute, these federal officer removal statutes provide substantial advantage to the federal defendant. First, not all defendants need join in removal.[65] Thus, even if several nonfederal defendants object, the case can be removed. Second, the removing defendant does not have to show that the district court would have had original jurisdiction over the case had it initially been brought in the federal rather than state forum.[66] Hence, the absence of diversity or a federal question is irrelevant when a federal officer wants to remove. Once removed, additional federal claims can be added to the complaint.[67] If a defect exists in service of process in the original suit, the plaintiff can perfect service after removal.[68]

The major concern in removal is demonstrating that the case bears some relation to the defendant's official duties. The defendant (or one acting under him under § 1442(a)(1)) must show that he is being sued for or charged with an act "under color" of his office or "on account of any right, title or authority claimed under any [law] for the apprehension or punishment of criminals," (if removal is under § 1442(a)(1)) or where he "claims any right title, or authority under a law . . . respecting the armed forces . . . or under the law of war" (if removal is under § 1442a). Unlike the general removal statute which courts construe strictly, courts construe this language of § 1442(a)(1) and § 1442a broadly.[69]

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[65]Bradford v. Harding, 284 F.2d 307 (2d Cir. 1960).

[66]Mir, 646 F.2d at 344; S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 35 (2d Cir. 1979).

[67]See Pavlov v. Parsons, 574 F. Supp. 393 (S.D. Tex. 1983).

[68]28 U.S.C. § 1448 (1995).

[69]But see Virginia v. Harvey, 571 F. Supp. 464 (E.D. Va. 1983) (removal of involuntary manslaughter charge against Marine driver denied).

The case leading case on the scope of removal is Willingham v. Morgan.

WILLINGHAM v. MORGAN
395 U.S. 402 (1969)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioners Willingham and Jarvis are, respectively, the warden and chief medical officer at the United States Penitentiary at Leavenworth, Kansas. Respondent Morgan was a prisoner at the penitentiary at the time he filed this suit in the Leavenworth County District Court. He alleged in his complaint that petitioners and other anonymous defendants had on numerous occasions inoculated him with "a deleterious foreign substance" and had assaulted, beaten, and tortured him in various ways, to his great injury. He asked for a total of $3,285,000 in damages from petitioners alone. . . . Petitioners filed a petition for removal of the action to the United States District Court for the District of Kansas, alleging that anything they may have done to respondent "was done and made by them in the course of their duties as officers of the United States . . . and under color of such offices. . . ." The Federal District Judge denied respondent's motion to remand the case to the state courts. . . . [T]he Tenth Circuit . . . found insufficient basis in the record to support the District Court's refusal to remand the case to the state courts. . . . We reverse.

I.

The court below held that the "color of office" test of § 1442(a)(1) "provides a rather limited basis for removal. . . ." It noted that the record might well have supported a finding that petitioners were protected from a damage suit by the official immunity doctrine. But it held that the test for removal was "much narrower" than the test for official immunity . . . and accordingly that petitioners might have to litigate their immunity defense in the state courts. The government contends that this turns the removal statute on its head. It argues that the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties. On this view, the test for removal should be broader, not narrower, than the test for official immunity. We agree. . . .

[T]he right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act "under color" of federal office, regardless of whether the suit could originally have been brought in a federal court. Federal jurisdiction rests on a "federal interest in the matter," Poss v. Lieberman, 299 F.2d 358, 359 (C. A. 2d Cir.), cert. denied, 370 U.S. 944 (1962), the very basic interest in the enforcement of federal law through federal officials.

Viewed in this context, the ruling of the court below cannot be sustained. The federal officer removal statute is not "narrow" or "limited." Colorado v. Symes, 286 U.S. 510, 517 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute--as its history clearly demonstrates--was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words "under color of . . . office." In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the federal government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).

II.

The question remains, however, whether the record in this case will support a finding that respondent's suit grows out of conduct under color of office, and that it is, therefore, removable. Respondent alleged in his motion for remand that petitioners had been acting "on a frolic of their own which had no relevancy to their official duties as employees or officers of the United States. . . ." Willingham declares that the only contact he has had with respondent was "inside the walls of the United States Penitentiary . . . and in performance of [his] official duties as Warden of said institution." Petitioner Jarvis declares, similarly, that his only contact with respondent was at the prison hospital "and only in the performance of [his] duties as Chief Medical Officer . . ."

The Judicial Code requires defendants who would remove cases to the federal courts to file "a verified petition containing a

short and plain statement of the facts" justifying removal. 28 U.S.C. § 1446(a). Moreover, this Court has noted that "the person seeking the benefit of [the removal provisions] should be candid, specific and positive in explaining his relation to the transaction" which gave rise to the suit. Maryland v. Soper (No. 1), 270 U.S. 9, 35 (1926); see Colorado v. Symes, supra, at 518-521. These requirements must, however, be tailored to fit the facts of each case.

It was settled long ago that the federal officer, in order to secure removal, need not admit that he actually committed the charged offenses. Maryland v. Soper (No. 1), supra, at 32-33. Thus, petitioners in this case need not have admitted that they actually injured respondent. They were, therefore, confronted with something of a dilemma. Respondent had filed a "scattergun" complaint, charging numerous wrongs on numerous different (and unspecified) dates. If petitioners were to be "candid, specific and positive" in regard to all these allegations, they would have to describe every contact they had ever had with petitioner, as well as all contacts by persons under their supervision. This would hardly have been practical, or even possible, for senior officials like petitioners.

[W]e think it was sufficient for petitioners to have shown that their relationship to respondent derived solely from their official duties. Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted official authority. Maryland v. Soper (No. 1), supra, at 33. "It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution." Ibid. In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times. If the question raised is whether they were engaged in some kind of "frolic of their own" in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. . . .

Removal should be liberally allowed where a federal officer can raise a defense arising out of his duty to enforce federal law, such as the official immunity defense that the defendants in Willingham sought to introduce.[70] As the Supreme Court has held, the presence of a federal defense is critical to sustaining removal of a state criminal prosecution.[71]

MESA v. CALIFORNIA
489 U.S. 121 (1989)

Justice O'CONNOR delivered the opinion of the Court.

> We decide today whether United States Postal Service employees may, pursuant to 28 U.S.C. § 1442(a)(1), remove to Federal District Court state criminal prosecutions brought against them for traffic violations committed while on duty.
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> I
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> In the summer of 1985 petitioners Kathryn Mesa and Shabbir Ebrahim were employed as mail truck drivers by the United States Postal Service in Santa Clara County, California. In unrelated incidents, the State of California issued criminal complaints against petitioners, charging Mesa with misdemeanor-manslaughter and driving outside a laned roadway after her mail truck collided with and killed a bicyclist, and charging Ebrahim with speeding and failure to yield after his mail truck collided with a police car. . . .

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[70] See Williams v. Brantley, 492 F. Supp. 925 (W.D.N.Y. 1980), aff'd, 738 F.2d 419 (2d Cir. 1984).

[71] See Willingham v. Morgan, 395 U.S. 402 at 409, n. 4 (1969). E.g., North Carolina v. Cisneros, 947 F.2d 1135 (4th Cir. 1991) (corporal's allegation that brakes on military vehicle failed did not involve a federal defense and thus state prosecution for vehicular homicide could not be removed to federal court); Application of Donovan, 601 F. Supp. 574 (S.D.N.Y. 1985) (former Secretary of Labor seeks to remove state felony indictment charging state crimes allegedly committed while he was in office); Colorado v. Maxwell, 125 F. Supp. 18 (D. Colo. 1954) (state sheriff who detained a soldier at the request of military authorities shot him when he tried to escape).

[T]he United States Attorney for the Northern District of California filed petitions in the United States District Court for the Northern District of California for removal to that court of the criminal complaints brought against Ebrahim and Mesa. The petitions alleged that the complaints should properly be removed to the Federal District Court pursuant to 28 U.S.C. § 1442(a)(1) because Mesa and Ebrahim were federal employees at the time of the incidents and because "the state charges arose from an accident involving defendant which occurred while defendant was on duty and acting in the course and scope of her employment with the Postal Service."

. . . .

The United States and California agree that Mesa and Ebrahim, in their capacity as employees of the United States Postal Service, were "person[s] acting under" an "officer of the United States or any agency thereof" within the meaning of § 1442(a)(1). Their disagreement concerns whether the California criminal prosecutions brought against Mesa and Ebrahim were "for act[s] under color of such office" within the meaning of that subsection. The United States, largely adopting the view taken by the Court of Appeals for the Third Circuit in Pennsylvania v. Newcomer, 618 F.2d 246 (1980), would read "under color of office" to permit removal "whenever a federal official is prosecuted for the manner in which he has performed his federal duties. . . ." California, following the Court of Appeals below, would have us read the same phrase to impose a requirement that some federal defense be alleged by the federal officer seeking removal.

. . . .

The government's view, which would eliminate the federal defense requirement, raises serious doubt whether, in enacting § 1442(a), Congress would not have "expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491, 103 S. Ct. 1962, 76 L.Ed.2d 81 (1983). In Verlinden, we discussed the distinction between "jurisdictional statutes" and "the federal law under which [an] action arises, for Art. III purposes," and recognized that pure jurisdictional statutes which seek "to do nothing more than grant jurisdiction over a particular class of cases" cannot support Art. III "arising under" jurisdiction. Id., at 496, 103 S. Ct., at 1970, citing The Propeller Genesse Chief v. Fitzhugh, 12 How. 443, 451-543, 13

L.Ed. 1058 (1852); Mossman v. Higginson, 4 Dall. 12, 1 L.Ed. 720 (1800). In Verlinden we held that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, is a "comprehensive scheme" comprising both pure jurisdictional provisions and federal law capable of supporting Art. III "arising under" jurisdiction. 461 U.S., at 496, 103 S. Ct., at 1972.

Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes. The removal statute itself merely serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged. See Verlinden, supra, at 494, 103 S. Ct., at 1971-72; Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L.Ed.2d 650 (1986) (under the "well-pleaded complaint" rule "[a] defense that raises a federal question is inadequate to confer federal jurisdiction"); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908). Adopting the government's view would eliminate the substantive Art. III foundation of § 1442(a)(1) and unnecessarily present grave constitutional problems. We are not inclined to abandon a longstanding reading of the officer removal statute that clearly preserves its constitutionality and adopt one which raises serious constitutional doubt. . . .

At oral argument the government urged upon us a theory of "protective jurisdiction" to avoid these Art. III difficulties. Tr. of Oral Art. 6. In Willingham, we recognized that Congress enactment of federal officer removal statutes since 1815 served "to provide a federal forum for cases where federal officials must raise defenses arising from their official duties . . . [and] to protect federal officers from interference by hostile state courts." 395 U.S., at 405, 89 S. Ct., at 1815. The government insists that the full protection of federal officers from interference by hostile state courts cannot be achieved if the averment of a federal defense must be a predicate to removal. More important, the government suggests that this generalized congressional interest in protecting federal officers from state court interference suffices to support Art. III "arising under" jurisdiction.

We have, in the past, not found the need to adopt a theory of "protective jurisdiction" to support Art. III "arising under"

jurisdiction, Verlinden, supra, 461 U.S., at 491, n. 17, 103 S. Ct., at 1970, n. 17, and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged. In these prosecutions, no state court hostility or interference has even been alleged by petitioners and we can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions. . . .

> "[U]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the federal government. Because the regulation of crime is pre-eminently a matter for the States, we have identified a strong judicial policy against federal interference with state criminal proceedings." Arizona v. Manypenny, 451 U.S. 232, 243, 102 S. Ct. 1657, 1665, 68 L.Ed.2d 58 (1981) (citations and internal quotations omitted).

It is hardly consistent with this "strong judicial policy" to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is even at issue in such prosecutions. We are simply unwilling to credit the government's ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers by charging them with traffic violations and other crimes for which they would have no federal defense in immunity or otherwise. That is certainly not the case in the prosecutions of Mesa and Ebrahim, nor was it the case in the removal of the state prosecutions of federal revenue agents that confronted us in our early decisions. In those cases where true state hostility may have existed, it was specifically directed against federal officers' efforts to carry out their federally mandated duties. E.g., Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648 (1880). As we said in Maryland v. Soper (No. 2), 270 U.S., at 43-44, 46 S. Ct., at 193-94, with respect to Judicial Code § 83:

> "In answer to the suggestion that our construction of § 33 and our failure to sustain the right of removal in the case before us will permit evilly minded persons to evade the useful operations of § 33, we can only say that, if prosecutions of this kind come to be used to obstruct seriously the enforcement of federal laws,

> it will be for Congress in its discretion to amend § 33 so that the words . . . shall be enlarged to mean that any prosecution of a federal officer for any state offense which can be shown by evidence to have had its motive in a wish to hinder him in the enforcement of federal law, may be removed for trial to the proper federal court. We are not now considering or intimating whether such an enlargement would be valid; but what we wish to be understood as deciding is that the present language of § 33 can not be broadened by fair construction to give it such a meaning. These were not prosecutions, therefore, commenced on account of acts done by these defendants solely in pursuance of their federal authority. With the statute as it is, they can not have the protection of a trial in the federal court. . . ."
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> Chief Justice Taft's words of 63 years ago apply equally well today; the present language of § 1442(a) cannot be broadened by fair construction to give it the meaning which the Government seeks. Federal officer removal under 28 U.S.C. § 1442(a) must be predicated upon averment of a federal defense. Accordingly, the judgment of the Court of Appeals is affirmed.
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> SO ORDERED.
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> [Footnotes and concurring opinion omitted.]

Although removal should be sustained where the criteria of the statutes are met, removal may be improvident if an agency is little more than a stakeholder in the litigation. A typical example is a divorce case in which entitlement to military retired pay is at issue.[72]

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[72] See Murray v. Murray, 621 F.2d 103 (5th Cir. 1980) (U.S. garnishee in alimony action based on Veterans' Administration disability benefits to retired soldier); Williams v. Williams, 427 F. Supp. 557 (D. Md. 1976); Wilhelm v. United States Dep't of the Air Force Accounting and Finance Center, 418 F. Supp. 162 (S.D. Tex. 1976) (Air Force retired pay). See also Matter of Marriage of Smith, 549 F. Supp. 761, 765-66 (W.D. Tex. 1982) (no grounds for removal of contempt action against retired soldier for failing to pay share of retired pay in divorce--contempt action is not civil action or criminal prosecution commenced in state court).

The procedure for removal is provided in 28 U.S.C. § 1446 which, apart from the time limits in removal actions based on § 1442(a)(1), requires the party seeking removal to file:

> . . . [A] notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served upon such defendant or defendants in such action.[73]

Pending state proceedings in civil cases stop as soon as the petition is filed in the district court and a copy is filed with the state court.[74] Despite the filing of the petition, the proceedings in a criminal case may continue up to, but short of entry of conviction, but they stop when the removal petition is granted.[75] In a criminal case, a defendant in state custody is released to a marshal on a writ of habeas corpus which the district will issue on granting removal.[76]

In civil cases, removal occurs immediately on filing of the notice in the federal and state court and service of notice on all parties. A motion to remand the case to the state court on the basis of any defect in removal procedure must be made within 30 days of filing the notice of removal.[77] In criminal cases, an evidentiary hearing must be held before removal can be granted.[78] Hence, the state prosecutor

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[73]28 U.S.C. § 1446(a) (1995).

[74]Id. § 1446(d) (1995).

[75]Id. § 1446(c)(3) (1995).

[76]Id. § 1446(e) (1995).

[77]Id. § 1446(b) (1995).

[78]Id. § 1446(c)(5) (1995).

can attempt to block removal before it occurs, and, if he fails, he can then move to remand, as in a civil case.

An order remanding a case that was removed under § 1442 or § 1442a cannot be appealed when the removal was improvident and without jurisdiction.[79] If the remand order was based on other, impermissible grounds, appeal may be possible by way of mandamus.[80] Denial of a motion to remand is not a final judgment and, therefore, generally cannot be appealed as an interlocutory matter,[81] although relief in criminal cases may be sought by mandamus.[82] Once granted, an order to remand can neither be set aside nor reconsidered by the court.[83] On remand, the court may require the defendant seeking removal to pay the opposing party's costs and expenses, including attorney fees, incurred as a result of the removal.[84]

After removal, the action proceeds as it would had it been brought in the district court first. The substantive law of the state remains applicable after removal.

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[79] Id. § 1447(d) (1995). See, e.g., Hammons v. Teamsters, 754 F.2d 177 (6th Cir. 1985).

[80] Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) (remand based on overcrowded docket was appealable). See Sheet Metal Workers Inter. Assoc. v. Seay, 696 F.2d 780 (10th Cir. 1983) (mandamus to retain jurisdiction in federal court granted where reason for remand was that state court was more convenient forum).

[81] Aucoin v. Matador Serv., Inc., 749 F.2d 1180 (5th Cir. 1985); Dixon v. Georgia Indigent Legal Serv., Inc., 388 F. Supp. 1156 (S.D. Ga. 1974), aff'd, 532 F.2d 1373 (5th Cir. 1976).

[82] Pennsylvania v. Newcomer, 618 F.2d 246, 248-49 (3d Cir. 1980).

[83] E.g., Three J. Farms, Inc. v. Alton Box Board Co., 609 F.2d 112 (4th Cir. 1979), cert. denied, 445 U.S. 911 (1980).

[84] 28 U.S.C. § 1447(c) (1995).

The Supreme Court addressed this point in Arizona v. Manypenny,[85] where it considered whether Arizona could appeal the judgment of acquittal of a federal border patrolman accused of maiming an illegal immigrant. The prosecution, begun in state court, was removed under § 1442(a)(1). State authorities then prosecuted the case in district court, applying Arizona law. Despite a jury verdict of guilty, the court later rendered a judgment of acquittal based on official immunity. The state sought to appeal, but the Ninth Circuit decided that no federal statute authorized appeal by a state in a removal case. The Supreme Court held that removal could not cut off the right of appeal that the state would have had if the case remained in the state court. The Court emphasized the predominance of state law in the removal process:

> The Court of Appeals concluded that the fact of removal substantially alters the State's right to seek review. Reasoning that a case brought pursuant to § 1442(a)(1) arises under federal law, the court held that state enabling statutes retain no significance. But a state criminal proceeding against a federal officer that is removed to federal court does not "arise under federal law" in this pre-empting sense. Rather, the federal court conducts the trial under federal rules of procedure while applying the criminal law of the State. Tennessee v. Davis, 100 U.S. 257, 271-272 (1880). See Fed. Rule Crim. Proc. 54(b)(1), Advisory Committee Notes, 18 U.S.C. App., pp. 1480-1481.
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> . . . .
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> [T]he invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied. In this respect, it is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties. Federal involvement is necessary in order to insure a federal forum, but it is limited to assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law. Thus, while giving full effect to the purpose of removal, this Court retains the highest regard for a State's right to

[85] 451 U.S. 232 (1981).

> make and enforce its own criminal laws. Colorado v. Symes, 286 U.S., at 517-518. . . .[86]

As the Court noted, even though state substantive law applies, federal law applies to procedure and other federal questions.[87] Official immunity is one of the most important issues that is decided under federal law rather than under state law, as demonstrated by the district court decision in Arizona v. Manypenny.[88]

In practice, removal of cases involving federal officers is not a complex or difficult procedure. It does, however, require close and timely coordination between the defendant being sued, the local staff judge advocate or legal adviser, Army Litigation, and the Department of Justice.

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[86]451 U.S. at 241-43. Compare City of Aurora v. Erwin, 706 F.2d 295 (10th Cir. 1983) (state right to jury trial binding on federal magistrate in trial of petty offense removed from state court).

[87]See, e.g., Fed. R. Crim. P. 54(b)(1).

[88]See Maryland v. Chapman, 101 F. Supp. 335 (D. Md. 1951) (although state law applied to removed manslaughter prosecution of Air Force pilot who crashed in a populated area, defendant held to have official immunity); Montana v. Christopher, 345 F. Supp. 60 (D. Mont. 1972) (traffic citation removed under § 1442a and airman held to have official immunity despite applicability of state law).